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In the
Supreme Court of the United States.

OCTOBER TERM, 1979.

No. 79-1557.

COMMONWEALTH OF MASSACHUSETTS,
PETITIONER,

v.

JOHN KEVIN HURLEY,
RESPONDENT.

Supplemental Brief in Support of the Petition for a Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts.

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Introduction.

The Commonwealth's petition for writ of certiorari was docketed on April 4, 1980. On May 12th Justice Powell delivered the opinion of the Court in *Cuyler* v. *Sullivan* (No. 78-1832, 27 Cr. L. 3100). Pursuant to Rule 24(5), Rules of the Supreme Court, the Commonwealth submits this supplemental brief discussing the impact of *Cuyler* v. *Sullivan* on the present petition.

Reasons for Review.

The petition seeks to resolve the quantum of proof of a conflict of interests sufficient to deprive a defendant of effective assistance of counsel (Petition 2). The second question presented asks whether a post-trial claim of denial of effective assistance of counsel can be upheld absent a showing of specific prejudice from the conflict (Petition 2). *Cuyler* v. *Sullivan* sets forth a two-part test to determine if a conflict of interests warrants reversal of a conviction:

> "In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." 27 Cr. L. 3104 (May 12, 1980).

First, an actual conflict of interests must exist, and second, the conflict must adversely affect the lawyer's performance. The questions presented in the petition can be answered through the application of the *Cuyler* test to the facts of the case at hand.

While the Supreme Judicial Court found a genuine conflict of interests confronted Attorney Quarles (Petition, A. 5A), the Commonwealth urges this Court to examine the primary facts of the case. Quarles did not represent Andrews as a witness at the trial of Hurley (Petition, A. 3a, 25a). The conflict, if any, grew out of Quarles' friendship with Andrews and his representation of the witness in other matters (Petition, A. 5a). The loyalties and duties arising from this relationship are more tenuous than those arising from the multiple representation of co-defendants tried separately as in *Cuyler* v. *Sullivan*, or together as in *Glasser* v. *United States*, 315 U.S. 60 (1942). The

Commonwealth does not concede Attorney Quarles labored under an actual conflict of interests (Petition 8-9). Granting certiorari will provide an opportunity to further define what constitutes an actual conflict.

The word prejudice in the context of a discussion of conflict of interests has been associated with harmless error, a doctrine ruled inapplicable to a conflict case in *Cuyler* v. *Sullivan*, 27 Cr. L. 3104 (May 12, 1980). The use of the word by the petitioner was not meant to limit the second question presented to an issue of harmless error. The following excerpt from the petition clarifies the scope of the question:

> "The petitioner contends that a lack of prejudice is significant in determining whether the evidence of a conflict from dual representation is sufficient to warrant reversal under the Sixth Amendment. This consideration of prejudice is distinct from the harmless error doctrine but a counterpoint to the presumed prejudice of *Holloway* v. *Arkansas*." (Petition 10.)

The determination in *Cuyler* that the conflict must adversely affect the lawyer's performance resolves the issue raised by the second question.

The Supreme Judicial Court conceded the asserted genuine conflict did not adversely affect the lawyer's performance by stating in its opinion:

> "'Thus it is not material that the record does not show that Mr. Quarles' relationship with Andrews occasioned any actual inadequacy in his representation of Hurley. The testimony of Andrews was identical to that of Hurley. In effect, Andrews bolstered the defense's theory of the case by testifying that he gave permission to Hurley to buy

drugs from Wines. Nor is this a case where Mr. Quarles was given any confidential information by Andrews that might restrict his cross-examination of Andrews. Mr. Quarles did not appear to hold back on his questioning." (Petition, A. 6a.)

In *Cuyler* v. *Sullivan*, this Court's analysis of *Glasser* v. *United States*, 315 U.S. 60 (1942), and *Dukes* v. *Warden*, 406 U.S. 250 (1972), indicates that proof of the adverse effect of the conflict should be apparent in the record of the case. 27 Cr. L. 3104. There being no evidence of an adverse effect in the present case, a writ of certiorari should issue to enable the correction of the Supreme Judicial Court's erroneous constitutional ruling.

Conclusion.

The issuance of a writ of certiorari leading to a full hearing of the case before this Court will serve to develop the important rulings set forth in *Cuyler* v. *Sullivan*. Alternatively, the granting of the petition coupled with the summary reversal of the judgment of the Supreme Judicial Court, to the extent that

the judgment reversed the conviction of the defendant Hurley, will serve to harmonize this case with the rulings of *Cuyler* v. *Sullivan*.

Respectfully submitted,

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